THE LAW OF EVIDENCE

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LEGISLATION

There were no legislative provisions of note pertinent to the law

CASE LAW

ADMISSIONS AND CONFESSIONS

Admissions: civil proceedings

The Supreme Court of Appeal dealt with the withdrawal of an admission in civil proceedings in *Saayman v Road Accident Fund* 2011 (1) SA 106 (SCA). The court (para [12]) held that a concession made during the course of counsel's address did not amount to a formal admission. Consequently, it was not necessary for an application for a formal withdrawal of the statement to be made. It was possible for the concession be withdrawn at any time during the trial in the absence of prejudice to the opposing party.

Heher JA (Leach JA and Majiedt AJA concurring), agreeing with the majority judgment of Bosielo JA, gave a separate judgment providing additional grounds and it is in this judgment that the court expands on the characteristics of an admission. The first hurdle to overcome in following this aspect of the judgment is to determine whether the court views the arguments presented as pertaining to informal or formal admissions. The court explicitly characterizes the relevant statements as informal admissions as they were not recorded as admissions by the court. In doing so the judges refer to section 5 of the Civil Proceedings Evidence Act 25 of 1965, which is somewhat confusing, as section 5 has nothing to say on the matter. (This is perhaps due to the fact that DT Zeffertt, AP Paizes and A St Q Skeen (*The South African Law of Evidence* (2003) 784) mistakenly refer to section 5 when they actually mean section 15.) It must be presumed that the court is

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referring to section 15 of the Civil Proceedings Evidence Act, which provides: 'It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings.'

As a formal admission may be express or implied, oral or in writing, it becomes necessary to ascertain when a fact is admitted on the record of proceedings. I have been unable to find any authority for the view that the admission must be explicitly entered onto the record as a formal admission by the presiding officer. In the absence of such authority the recording requirement need not extend any further than that the admission be made in court during trial proceedings and consequently form part of the court record. However, there is authority for the view that counsel's address in opening or closing does not form part of the court record (*Standard Bank of SA Ltd v Minister of Bantu Education* 1966 (1) SA 229 (N) at 242–3; *Kevin and Lasia Property Investment CC v Roos NO* 2004 (4) SA 103 (SCA) para [12]).

Unfortunately, *Saayman* does not provide clarity here as the judgment, despite declaring the statements in question informal admissions, goes on to consider whether a formal withdrawal was necessary. As informal admissions are items of evidence that can be contradicted or explained away there is no necessity to withdraw them. Formal admissions on the other hand must be formally withdrawn in compliance with established rules.

Against this background the court (para [28]) identified the following characteristics of a formal admission: *(a)* it is a statement against interest; *(b)* which has the effect of binding the maker; and *(c)* it must be made with intention (implied/explicit) for removing 'a fact that depends on proof from the field of contention'.

The court found that in the circumstances a statement against interest made during counsel's address did not constitute a formal admission, did not have the effect of binding the maker and consequently there was no necessity to apply for a formal withdrawal. Another statement against interest made in counsel's heads of argument was not grounded in fact and therefore constituted no more than the opinion of counsel. Furthermore, the concession made by counsel was not intended to be an admission of his client or to remove the particular fact from contention, and consequently, this did not require a formal withdrawal.

Admissions: criminal proceedings

Section 220 of the Criminal Procedure Act 51 of 1977 allows for the making of a formal admission by the accused. Such an admission will constitute 'sufficient proof of such fact'. In *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA), the Supreme Court of Appeal revisited the effect of such an admission and held that the words 'sufficient proof' meant that no further evidence was required to prove the fact admitted (see, for example, *S v Seleke* 1980 (3) SA 745 (A); *S v Sesetse* 1981 (3) SA 353 (A)). Cloete JA drew a distinction between formal and informal admissions, and held that an accused was not entitled to adduce evidence inconsistent with his section 220 admissions, or to require the State to adduce evidence on the facts formally admitted. An accused who wishes to lead inconsistent evidence must first persuade the court that he has a *bona fide* explanation as to why the admission was made in the first place and why he now wishes to withdraw it (para [37]). This approach reconciles the purpose of section 220 (to avoid wasting valuable resources in proving what is not in issue) and society's interest in reducing the risk of a wrong conviction.

The court in *Van der Westhuizen* noted that the provisions of section 105A(10) of the Criminal Procedure Act, whilst rendering admissions made in prior but unsuccessful plea negotiations inadmissible, contained a proviso which allowed the accused to waive this protection and 'agree to the recording of the admissions' (para [16]).

Confessions

The relevant facts in *S v Mkhize* 2011 (1) SACR 554 (KZD) can be cursorily summarized as follows: the accused was arrested on 27 August 2009 in respect of two murder charges. He was interviewed and a statement taken from him for the first time on 3 November 2009, and he made a confession to a commissioned police officer on 5 November 2009. The accused was brought to court for the first time on 6 November 2009. The court found that there had been a blatant disregard for the accused's constitutional right to be brought before court within 48 hours. Referring to *S v Viljoen* 2011 (1) SACR 554 (KZD), but not directly to section 35(5) of the Constitution of the Republic of South Africa, 1996, the court held that evidence obtained unconstitutionally could not be admitted into evidence. This categorical statement overlooks the necessity of establishing a link between the constitutional breach

and the procurement of the evidence and does not address a significant body of case law, in terms of which it is clear that a constitutional breach does not automatically lead to the conclusion that the accused's right to a fair trial has been infringed, or that the admission of evidence will be detrimental to the administration of justice. This lacuna in the court's exposition of the law may well be due to the fact that in the circumstances of the case it would have made little difference to the outcome. The court in any event took the precaution of finding that the state had not discharged the onus of proving that the confession was made freely and voluntary and without undue influence. It did so, on the basis of the strength of accumulative inferences to be drawn from the proven facts. Two of these facts were singled out for particular emphasis — the failure to bring the accused to court within the specified time limits set by the Constitution and the Criminal Procedure Act, and the absence of any substantial evidence, other than the confession, on which to base a conviction. Although the reasoning of the court is not always explicitly recorded, there can be no doubt that the South African Police Service would do well to absorb its message.

Appeal

In *S v Leve* 2011 (1) SACR 87 (ECG), Jones J reiterated the fundamental rule that a court of appeal should not 'depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong' (para [8]). This principle, the court held (para [90]), applied equally to the trial court's application of a cautionary rule.

In *Minister of Safety and Security v Craig* 2011 (1) SACR 469 (SCA), the Supreme Court of Appeal drew a distinction between findings of credibility based on demeanour and those arising as a result of inferences drawn from the facts. In the latter instance, an appeal court would not be so reluctant to interfere with the trial court's finding of credibility, particularly where the credibility findings are not borne out by the record. The court noted that 'a court of appeal, with the benefit of the full record, may often be in a better position to draw inferences' (para [58]).

In *S v Ncube* 2011 (2) SACR 471 (GSJ), the court permitted evidence on appeal in order to complete the reconstruction of an incomplete record. Lamont J, noting both Constitutional Court (*S v Lawrence* 1997 (4) SA 1176 (CC)) and Supreme Court of

Appeal (*Colman v Dunbar* 1933 AD 141) authority for the general rule that evidence on appeal would be allowed only in exceptional circumstances, held that the relevant criteria were present in the matter before him. These included the need for finality, the need to avoid prejudice, the materiality and weight of the evidence and a sufficient explanation for the need to lead evidence on appeal. The new evidence also did not include a material dispute of fact.

The court's reasoning on this aspect of the judgment provides a useful summary of the existing law (at 472–6).

Cautionary Rules

Children

The cautionary rule applicable to children was significant to the appeal heard in *S v Hanekom* 2011 (1) SACR 430 (WCC). Saner AJ upheld the appeal and overturned the conviction of indecent assault on the basis that the court *a quo* erred in not paying sufficient attention to the cautionary rule in finding that the accused's guilt had been proven beyond reasonable doubt. There is nothing contentious about the judgment in that the court cannot be faulted on its articulation or application of the law. However, if one reads the judgment the recurring question arises — is such a cautionary rule necessary at all? There were sufficient indicators as to the potential unreliability of the complainant's testimony for the court to reach the same conclusion without the application of the cautionary rule; for example, material inconsistencies within the child's testimony. The same doubt would have arisen whether it was a child or adult. However, if more was understood about the recall of children, the court may (or may not) have concluded that the inconsistencies were not material given the three year delay between occurrence and trial as well as the child's ignorance of adult sexuality. The discriminatory effect of this cautionary rule, which is not necessarily supported by social science evidence, has been raised and discussed in a number of forums. Perhaps the time is ripe for a constitutional challenge — perhaps like the cautionary rule applicable to complainants in sexual offence cases it will be found to have no rational basis.

However, the uncritical description of the cautionary rule applicable to the child witness in *S v Leve* (2011 (1) SACR 87 (ECG) para [9]) indicates that it is unlikely that the courts in the

near future are likely to develop the common law so as to accord with social science research or developments in Anglo-American jurisdictions which view this rule as archaic. Arguments as to the constitutionality of this cautionary rule have been made elsewhere (see PJ Schwikkard in Artz & Smythe *Should We Consent?* (2008) 79).

Single witness

In *S v Mahlangu* 2011 (2) SACR 164 (SCA), dealing with a challenge to the weight given to the evidence of a single witness involved in a police trap, the appeal court held that the cautionary rules did not require a presiding officer to expressly use specific phrases ('for example, 'cautionary rule', or 'evidence of a trap'). It was sufficient for a presiding officer to demonstrate in his judgment that he was aware of the necessity of taking care in his/her evaluation of the evidence. This is a pragmatic approach which begs the question as to why in the absence of a jury the cautionary rules are retained at all.

See also Identification below.

Children

Section 170A inquiry

In *Kerkhoff v Minister of Justice and Constitutional Development* 2011 (2) SACR 109 (GNP), Southwood J, after providing a useful summary of *DPP, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC), in which the constitutionality of section 170A of the Criminal Procedure Act was considered, noted that the inquiry into whether an intermediary should be appointed was a narrow one. The inquiry was restricted to whether it was in the best interests of a child for an intermediary to be appointed to assist the child to testify. Section 170A was not intended to provide the opportunity for a trial-within-a-trial to be held to determine the competence and credibility of the child witness (para [7]).

In camera hearing

In *Media 24 v NPA* 2011 (2) SACR 321 (GNP), Raulinga J came to a pragmatic compromise in balancing the constitutional right of freedom of expression and the constitutional rights of the child in applying section 63(5) of the Child Justice Act 75 of 2008. Section 63(5) reads: 'No person may be present at any sitting of a child

justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present.'

One of the accused in the trial dealing with the murder of Eugene Terre'blanche was a minor. Due to the considerable public interest in the case, the press sought access to the proceedings and applied for a limited number of journalists to be present during the trial. The court held that section 63(5) clearly granted the court a discretion to permit the presence of specified persons during the trial of a minor. It held that section 63(5) constituted an exception to the requirement that trials be held in open court. Although it is not clear that the court drew a distinction between 'what is interesting to the public' and 'the public interest' (para [16]), it fashioned an order that could accommodate a wide range of interests — a restricted number of journalists and four members of the Terre'blanche family would be permitted to view the trial by means of closed circuit television, and the identity of the minor would be protected through blurring of the image (or some other means.) In this way the child was protected from having his identity revealed and from the potential stress and intimidation he might have felt having the media and/or public present in the court room. At the same time, the public's right to access to information and interest in open court proceedings was minimally restricted.

Evidence on sentencing

The importance of leading evidence in order for a court to properly balance the interests of children with other societal interests when sentencing a mother was emphasized in *S v Pillay* 2011 (2) SACR 409 (SCA). The court found that there had been insufficient evidence before the court *a quo* when it had sentenced the accused, a mother of six children. It consequently set the sentence aside and remitted the matter to the trial court to impose sentence afresh. Seriti JA emphasized the proactive role that needs to be played by the State, presiding officers and legal representatives. The court did not rule out the possibility of a sentence of incarceration for parents whose children would be at risk — it simply emphasized the importance of a court having sufficient evidence before it in order to balance all (and sometimes competing) interests (see *MS v S (Centre for Child Law as Amicus Curiae)* 2011 (2) SACR 88 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC)).

For a further discussion of evidence provisions affecting children, see 'Cautionary Rules' above.

Discharge

Although the decision to refuse discharge in terms of section 174 of the Criminal Procedure Act was no doubt factually sound in *S v Masondo; In Re S v Mthembu* 2011 (2) SACR 286 (GSJ), the judgment is rather surprising in its dismissal of constitutional considerations such as equality, the privilege against self-incrimination and the right to a fair trial. All of these have been applied by the Supreme Court of Appeal (*S v Lubaxa* 2001 (2) SACR 703 (SCA); *S v Legote* 2001 (2) SACR 179 (SCA)) in determining the appropriate scope of the discretion conferred by section 174 to grant discharge at the close of the State case. Kgomo J's dismissal of constitutional considerations appears to rest on the fact that after the close of the State case, if an accused is refused discharge, he or she may simply close his or her own case without testifying. This ignores the vagaries of legal representation and the court's duty to uphold the constitutional right to a fair trial.

The Supreme Court of Appeal has held that if there is no evidence against the accused at the close of the state case, they must be discharged (*Legote* (supra)). Whether this requires the prosecution to establish a *prima facie* case, or evidence sufficient to sustain a reasonable and probable belief in guilt, remains an open question (*Lubaxa* (supra)). In *Lubaxa,* Nugent JA distinguished a single accused from a co-accused, and held that where there is the possibility that a co-accused may incriminate the applicant, then discharge may be refused despite the absence of sufficient evidence against the applicant, and such refusal would not constitute an infringement of constitutional rights.

The uncertainties raised by *Lubaxa* were partially addressed by the Supreme Court of Appeal in *S v Nkosi* 2011 (2) SACR 482 (SCA). In *Nkosi,* it was common cause that in the court *a quo* the state had failed to establish 'any evidence against the first appellant on which a reasonable man could convict him at the end of the case' (para [24]). (This wording would suggest that for the State to avoid discharge it is required to establish a *prima facie* case.) The court *a quo* refused to hear the application for discharge on the basis that there were multiple accused, and that accordingly such an application would be inappropriate. This,

the appeal court held in *Nkosi,* was not a proper application of *Lubaxa* which foresaw the possibility that in certain circumstances the failure to discharge a co-accused might amount to the infringement of a right to a fair trial (paras [25] and [26]). It concluded that the first appellant's right to a fair trial had been compromised through the court *a quo*'s refusal even to hear the application for discharge, as there was no ' reasonable basis, for an expectation that his co-accused might incriminate him' (para [26]). It is now clear that *Lubaxa* may not be evoked as a blanket precedent for refusing discharge on the application of a co-accused.

In *S v Agliotti* 2011 (2) SACR 437 (GSJ), the court reviewed the post-constitutional development of section 174 jurisprudence and, finding that the sole State witness incriminating Agliotti lacked all credibility, discharged the accused. The court, referring to *S v Mpetha* 1983 (4) SA 262 (C), noted that in section 174 proceedings credibility played only a limited role and would generally only be taken into consideration where 'it was of such poor quality that no reasonable person could possibly accept it' (para [262]).

Discovery

In *PFE International v Industrial Development Corporation of SA* 2011 (4) SA 24 (KZD), Motala AJ held that section 7 of the Promotion of Access to Information Act 2 of 2000 (PAIA) did not exclude the operation of the PAIA when it was invoked to facilitate the production of or access to records required for civil litigation where there was no rule of court that made provision for such access. Consequently, the court held that the PAIA could be invoked where the records required were in the possession of a person who was a party to the civil proceedings and the records in question were required prior to trial (such as for the purposes of pleading).

In *Kerkhoff v Minister of Justice and Constitutional Development* 2011 (2) SACR 109 (GNP), the court held that the raw data compiled by a third party in order to assist the state in assessing whether it was in the child's interest to testify through an intermediary in terms of section 170A of the Criminal Procedure Act did not form part of the police docket. The applicant accordingly should have sought access to the documentation in terms of the provisions of the PAIA.

Documentary Evidence

Part VI of the Civil Proceedings Evidence Act 25 of 1965 (CPEA) sets out the conditions in which documentary hearsay evidence may be admitted. (Section 3 of the Law of Evidence Amendment Act 45 of 1988 provides an alternative route to admissibility.) The construction of certain of the provisions of Part VI was in issue in *Muller v BOE Bank* 2011 (1) SA 252 (WCC). The documentary hearsay was a copy of an affidavit made for different proceedings by a person (the deponent) who was deceased by the time of the trial.

Binns-Ward J noted (para [24]) that a court must admit evidence that meets the requirements of section 34(1) of the Act, subject to the exclusionary provisions of section 34(3). Once the evidence is admitted, the court will determine what weight, if any, should be attached to the documentary hearsay evidence (s 35 of the CPEA).

It was common cause that the deponent had personal knowledge of the matters dealt with in his affidavit and that he was deceased, thus filling two of the prerequisites for admission in terms of section 34(1). However, subsection (1) also requires submission of the original document subject to the provisions of subsection (2)*(b)*. Section 34(2)*(b)* permits a copy of the original document to be produced if it is 'proved to be a true copy' and not allowing its production would otherwise cause undue delay or expense.

A stumbling block to admission was, of course, the absence of the original, the pre-1961 English case of *Bowskill v Dawson* [1954] 1 QB 288 suggesting that similarly but not identically worded legislation required proof of the existence of the original. Binns-Ward J noted that unlike the South African provision, the English counterpart required the copy to be certified a true copy (para [30]). The absence of this requirement meant that section 34(2)*(b)* fell to be interpreted differently in that it simply requires proof that the copy is a true copy. The court held that the applicable standard of proof was proof on a balance of probabilities (at para [32]). It accepted that the original had been lost and to continue looking for it would cause undue delay and expense. The court found it unnecessary to decide what the position would be if it was established that the original had been destroyed. Nevertheless, the court suggested that the legislature might want to consider 'improving the South African statute along the lines of the 1995 English Civil Evidence Act' (para [34]).

The court also departed from the reasoning of Devlin J in *Bowskill* that required an interpretation that favoured the least divergence from the common law. Binns-Ward J noted (para [36]) that section 34(1) was introduced precisely to allow a departure from the common law, and that section 34(2)*(b)* constituted an exception to section 34(1), not the common law. This approach also accords with the reminder to the courts in section 35 that they may attach as much weight as they deem fit, in the circumstances to the hearsay evidence that has been admitted. This flexibility, the court noted, facilitated the admission of relevant evidence and enhanced the ability of a court to 'justly decide civil cases' (para [36]).

The court's purposive approach to interpretation is welcome in an area in which practitioners and scholars frequently forget to question the rationale underlying legislative amendment.

Section 34(3) provides that '[n]othing in this Act shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish'. There is no clear definition of an interested person, and whether or not a deponent falls into this category will be determined on the facts of the case.

On the facts in *Muller v BOE Bank*, the court found that that the affidavit had not been made when the present litigation was contemplated by the deponent, that the deponent as an independent consultant was unlikely to be biased, and that the narrative of the affidavit did not show any bias. Furthermore, there was no indication of the deponent having a pecuniary or proprietary interest in the outcome. The affidavit was admitted into evidence (paras [48] and [49]; see also *Trend Finance (Pty) Ltd v Commissioner for SARS* [2005] 4 All SA 657 (C)).

Electronic Evidence

See 'Hearsay' below.

Expert Evidence

In considering whether the court *a quo* had properly dealt with the evidence of an expert as regards photographic identification, the court reiterated that the role of an expert was merely to assist the court. It held that the court *a quo* had correctly evaluated the identification evidence in taking into account the expert testimony and its

own observations of the features of the accused during the trial. The court referred to and applied *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA).

Hearsay

Data messages

The dictum of Malan J in *LA Consortium & Vending v MTN Service Provider* 2011 (4) 577 (GSJ) is another contribution to the slowly evolving jurisprudence on the appropriate interpretation of section 15 of the Electronic Communications and Transactions Act 25 of 2002. Section 15 reads:

'(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence —
  (a) on the mere grounds that it is constituted by a data message; or
  (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
(2) Information in the form of a data message must be given due evidential weight.
(3) In accessing the evidential weight of a data message, regard must be had to —
  (a) the reliability of the manner in which the data message was generated, stored or communicated;
  (b) the reliability of the manner in which the integrity of the data message was maintained;
  (c) the manner in which its originator was identified; and
  (d) any other relevant factor.
(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.'

Although it is not entirely clear from the judgment, it appears that the interpretation of subsection (4) should have been key to the court's reasoning, as the data messages in question were made by persons during the ordinary course of business. The reason it is unclear is that the judgment refers to a position taken on section 15(4) by Schwikkard and Van der Merwe in the second edition of *Principles of Evidence* (2002) (since then the evolving

case law has led to the expression of a slightly different view in the 2009 edition, see pages 414 et seq.) The court then contrasts this with a contrary view taken on s 15(1) by Zeffertt, Paizes and Skeen (*The South African Law of Evidence* (2003) 394). The passage referred to by Zeffertt et al does not deal with section 15(4) at all and the court fails to explain the relationship between subsections (1) and (4) of section 15.

If section 15(4) were not applicable, then the approach of the court is consistent with that in *Ndlovu v The Minister of Correctional Services* [2006] 4 All SA 165 (W) and *S v Ndiki* 2008 (2) SACR 252 (Ck), in so far as these courts held that where the information in a data message referred to in section 15(1)*(a)* is dependent on the credibility of a natural person who is not called as a witness, admissibility falls to be determined by the general hearsay provisions contained in section 3 of the Law of Evidence Amendment Act of 1988. But as section 15(4) did apply in *LA Consortium & Vending v MTN Service Provider*, the court's judgment is not consistent with the obiter statement in *Ndlovu* that section 15(4) 'provides an exception to the manner of proof and evidential weight ordinarily to be accorded to a data message' (at 172). Interpreting section 15(4) as a self-contained exception would also be consistent with the approach of Zeffertt et al that the admissibility of data messages which are hearsay will be determined by statutory exceptions to the hearsay rule (at 213). The most obvious statutory provision in this instance is section 15(4) of the Electronic Communications and Transactions Act. In the absence of an explanation as to why section 15(4) should not be viewed as an express exception to the hearsay rule, the approach of the court in *Ndlovu* is to be preferred.

Documentary hearsay

The appeal of the infamous Reitz four against sentence was heard by the High Court in *S v Van der Merwe* 2011 (2) SACR 509 (FB). In the course of making its remarkable finding that the video showing the simulated initiation and humiliation of black workers posing as black students did not show any racist motive (at 527), the court dealt cursorily in an obiter dictum with the admissibility of documentary hearsay. The appellants in mitigation of sentence had submitted a media article as example of the public vilification of the appellants. The state consented to its admission. The presiding officer in the court *a quo* clearly found this article to constitute an aggravating not mitigating factor. The appeal court

held that this amounted to an unfairness as the appellants had not been forewarned that it would be seen as an aggravating factor and that courts should be wary of assuming that press articles reflect the convictions of the community. It is no doubt correct that courts should be very cautious before according weight to press articles. However, are courts really required to give notice to a party that they may draw a negative inference from evidence that a party tenders in his or her favour? Although not clear it appears that the evidence was tendered by the appellants to prove that they had been vilified in the press, and it is clear that the court accepted this contention of the appellants. It was not used to prove a fact other than that which the appellants intended; it was the inference drawn from that fact that distinguished the approach of the appellants and the court *a quo*. An appeal court may well find such an inference to be unsubstantiated in the circumstances, but to require the court *a quo* to give the appellants an opportunity to contradict their own averment would seem to be pushing the boundaries of fairness at the sentencing stage. Unlike in the cases referred to by the court, the inference drawn by the court did not change the boundaries of the dispute or shift the onus of proof (cf *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A)).

Identification

The Supreme Court of Appeal once again set out the appropriate cautionary approach to be taken to eye-witness identification evidence in *S v Ngcamu* (2011 (1) SACR 1 (SCA) para [10]). It held that, on taking a holistic view of the evidence, there was no doubt that the identification in question was accurate. In reaching this conclusion the court cited the following passage from *S v Mthetwa* 1972 (3) SA 766 (A) at 768A–C:

> 'Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not

individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.'

Dock identification is subject to additional caution, as it runs the risk of been equated with a leading question. Nevertheless, in *S v Ramabokela* 2011 (1) SACR 122 (GNP), the court clearly stated that although dock identification must be treated with caution, it may nevertheless be relevant and carry weight. This is consistent with the approach taken by the Supreme Court of Appeal in *S v Mdlongwa* 2010 (2) SACR 419 (SCA), which was criticized in JQR 2010 (4) for attaching undue weight to dock identification. Cases expressing scepticism about dock identification include *S v Moti* 1998 (2) SACR 245 (SCA), *S v Maradu* 1994 (2) SACR 410 (W) and *S v Daba* 1996 (1) SACR 243 (E).

Interception and Monitoring

See unconstitutionally obtained evidence below.

Onus

Section 40(1)*(b)* of the Criminal Procedure Act provides that a peace officer may lawfully arrest a person without a warrant if he or she has a reasonable suspicion that the arrestee has committed an offence referred to in Schedule 1. As noted by Harms DP in *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA), '[i]t is trite that the onus rests on the defendant to justify an arrest' (para [7]). However, the issue of the onus nevertheless arose due to the introduction of what Harms DP terms a fifth jurisdictional fact by Bertelsmann J in *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T) — that arrest without a warrant must also be constitutionally justifiable. This requirement, according to the court in *Louw*, requires the arrestor to consider whether there is a less invasive manner in which to bring the suspect before a court (at 187f) (see also *Ralekwa v Minister of Safety and Security* 2004 (1) SACR 131 (T); *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (W); *Le Roux v Minister of Safety and Security* 2009 (2) SACR 252 (KZP); *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (E); *Mvu v Minister of Safety and Security* 2009 (2) SACR 292 (GSJ)).

After a careful consideration of the constitutional directive in section 39(2) to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights, Harms DP concluded that a number of High Courts had erred in following

Louw by reading into section 40(1)*(b)* this fifth jurisdictional fact. The Supreme Court of Appeal held that, absent a finding of unconstitutionality, the courts 'were not entitled to read anything into' the clear text of section 40(1)*(b)*; furthermore, that an arrest in terms of section 40(1)*(b)* could not be said to be arbitrary or without just cause; consequently, there appeared to be no ground for a constitutional challenge (para [25]). The court, making a careful distinction between jurisdictional fact and discretion, noted that a peace officer was not obliged to effect an arrest when the circumstances set out in section 40(1)*(b)* arose; he or she had a discretion whether or not to do so. This discretion, the court (referring to *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)) held, is required to be exercised in a manner that is objectively rational. The court found that in the circumstances of the particular case (and noting the seriousness of the offence) the peace officer had exercised his discretion rationally.

The court, obiter, then went on to consider the appropriate allocation of the onus in respect of establishing the rational exercise of a peace officer's discretion. Harms DP applied past precedent and held that this was an instant where the pleadings might give rise to two separate burdens. Once the arrestor has established the jurisdictional facts justifying an arrest in terms of section 40(1)*(b)*, the party alleging an irrational exercise of an arrestor's section 40(1)*(b)* discretion bears the onus of establishing the absence of rationality. Taking into account that a party alleging an infringement of a right in the Bill of Right bears the burden of proving such infringement, the court held that the common law in requiring the arrestee to prove irrationality on the part of the arrestor was not inconsistent with the Constitution. The court, noting that a person challenging a parole decision or the refusal of presidential pardon bore the burden of proof, concluded that it was irrelevant whether it was the right to freedom which was at stake. However, these two examples can also be distinguished from arrest without a warrant as a person seeking parole or a presidential pardon has already been deprived of his or her freedom by a court after guilt beyond a reasonable doubt has been established.

The court also held that as the onus was allocated in the context of civil proceedings, consideration 'of policy, practice and fairness' dictated that the arrestee bear the burden of proving rationality, and this was an additional indicator of consti-

tutionality. (Harms DP also refers to 'sensibility' which he strangely juxtaposes with trial fairness — perhaps the strangeness lies in my lack of imagination.) It would be impractical and unfair to expect an arrestor to negate all possible grounds for unreasonableness without them having being specifically pleaded by the claimant. However, it is unclear why this could not be discharged by an evidentiary burden, which, unlike the true onus, can shift between the parties. The imposition of an evidentiary burden on the arrestee would seem to align with the dictates of a policy shaped by the constitutional directive to promote the spirit, purport and objects of the Bill of Rights.

Prior Consistent Statements

See sexual offences below.

Right to Remain Silent

In *S v Tshabalala* 2011 (1) SACR 497 (GNP), Mavundla J held that a court is obliged to inform an accused who has pleaded guilty in terms of section 112 of the Criminal Procedure Act of his or her right to remain silent. The court also held that the failure to do so will not necessarily result in an infringement of the right to a fair trial. This qualification is consistent with the holding of the Supreme Court of Appeal in *DPP, Natal v Magidela* 2000 (1) SACR 459 (SCA). However, the categorical assertion that the court bears a constitutional duty to advise an accused who has pleaded guilty of the right to remain silent is not. The Supreme Court of Appeal, in *Magidela*, left this question open. High Courts have been divided on this issue (for example, *S v Maseko* 1996 (2) SACR 91 (W); *S v Damons* 1997 (2) SACR 218 (W)). Perhaps it really does not matter as it is hard to imagine circumstances in which an accused who has pleaded guilty can be prejudiced by answering questions. The reasoning in *Tshabalala* would have been more convincing if the court could have given a concrete example of how an accused who has pleaded guilty can compromise him- or herself further by answering questions.

Questioning in terms of section 112 is aimed at protecting the accused (*S v Williams* 2008 (1) SACR 65 (C)), and it would *prima facie* appear to be against the interest of the accused in those circumstances to suggest he or she remain silent. The right to remain silent is necessary to protect the accused in his or her contest against the State, but once he or she has pleaded guilty,

there is no longer a contest between the state and the accused, as the accused has clearly abdicated his or her right to be presumed innocent.

Sexual Offences

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 came into effect on the 16 December 2007. The relevant provisions of the Act read as follows:

> '58 Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous statements.
>
> '59 In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'

In *S v Leve* 2011 (1) SACR 87 (ECG), Jones J (Liebenberg and Van Zyl JJ concurring) observed that the child's timeous reporting of the sexual assault was 'relevant to the credibility of a complainant because failure to complain can give rise to criticism that he did not behave as would be expected of a child in the circumstances'. This would seem to be in direct conflict with section 59, which expressly prohibits the drawing of such an inference; one can only hope that this was an error and not an extension of the questionable cautionary rule applicable to children in order to circumvent section 59.

Similar Fact Evidence

In *S v Nduna* 2011 (1) SACR 115 (SCA), the Supreme Court of Appeal narrowly avoided the dangers of categorization and stressed relevance as the foundation for the admission of similar fact evidence. It admitted the evidence on the basis that matching fingerprints found on two vehicles involved in similar style robberies could not be explained away on the basis of coincidence.

Unconstitutionally Obtained Evidence

In *S v Cwele* 2011 (1) SACR 409 (KZP), Koen J, having held that the provisions of the Interception and Monitoring Prohibition

Act 127 of 1992 (the Act was repealed by the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002) could be interpreted so as to accommodate cellphone communications, considered *(a)* whether the interception was lawful; and *(b)* whether the evidence obtained as a result of the interception was admissible.

The application for a direction allowing interception and monitoring in terms of the 1992 Act referred to accused No 2 and two others but made no reference to accused No 1. Counsel for accused No 1 argued that the communications with a third party and those named in the direction were inadmissible against the third party (accused No 1). This argument was rejected by the court on the basis that it would be self-defeating and nonsensical to exclude evidence the obtaining of which underlay the application for the direction in the first place — to identify people to whom drugs were being supplied.

The accuseds' final argument in their desperate attempt to get the evidence of the intercepted cellphone conversations excluded was based on an assertion that even if the evidence had been lawfully obtained, admitting it would infringe the accuseds' right to privacy and dignity. It does not seem that the constitutionality of the 1992 Act was challenged but merely the admissibility of the evidence. Koen J correctly concluded that '[i]n the absence of an attack on the constitutionality of the relevant provisions of the Act, it would be incongruous to find that evidence, lawfully obtained and permitted in terms of the Act, was to be excluded on some other basis' (para [26]). The court noted (para [7]) that evidence obtained through unauthorized interception and monitoring would ordinarily be excluded.

In *S v Mkhize* 2011 (1) SACR 554 (KZD), the court held that a confession obtained in light of a constitutional breach should be excluded. This case is discussed above under admissions and confessions.

Witnesses

Competence

Section 192 of the Criminal Procedure Act provides that all persons not expressly excluded by the Act or the common law as it stood on the 30 May 1961 are competent witnesses. It is the duty of the court to determine the competence of a witness and a party may not consent to the admission of the evidence of an

incompetent witness (*S v Thurston* 1968 (3) SA 284 (A) at 291). In terms of section 194 of the Criminal Procedure Act, a person who is mentally ill and 'thereby deprived of the proper use of his reason' may not give evidence while the disability persists. It appears clear from the construction of the section that it is the inability to properly reason that is the disqualifying factor and not the medical diagnosis.

A court may elect to hold a trial-within-a-trial to determine competence, or it may reach its conclusions on the basis of its own observations of the witness (see *S v Zenzile* 1992 (1) SACR 444 (C)). In *S v Dladla* 2011 (1) SACR 80 (KZP), the court was required to determine whether the magistrate in the court *a quo* had correctly found the complainant to be a competent witness. The complainant was a patient in a mental institution who alleged that he had been assaulted by two night nurses. The appeal court in setting aside the convictions on the basis that the magistrate had failed to hold a proper inquiry into the competence of the accused did not note important distinguishing features of the cases relied upon. For example, *S v Mahlinza* 1967 (1) SA 408 (A), which calls for psychiatric evidence to be led, dealt with a finding on criminal capacity and not the testimonial competence of a witness; *S v Katoo* 2005 (1) SACR 522 (SCA) was a case in which a finding of incompetence was overturned with particular reference to the presumption of competence referred to in section 192. One wonders whether, if the court had taken these distinctions into account, it might have reached a different conclusion. What is clear from *Katoo* is that the essential inquiry is whether the witness can communicate with the court in a reasoned manner. Who better to make this assessment than the court who can then determine what weight it might wish to attach to the evidence in making its final decision? The decision in *Dladla* increases the vulnerability of a much marginalized sector of society.